IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-00897-JLK

WILDEARTH GUARDIANS,

Plaintiff,

v.

ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency

Defendant.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, Plaintiff WildEarth Guardians ("Guardians") hereby moves for partial summary judgment[1] on the issue of liability against Defendant Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency ("Administrator"). Resolving the issue of Defendant's liability quickly will both serve judicial economy and conserve the parties' resources by focusing this case on the only issue that may

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[1] Although the parties have not yet conducted their Rule 26(f) discovery conference or established a briefing schedule, summary judgment as to liability is appropriate at an early stage in this case, as there can be no genuine disputes as to any material fact regarding liability and the Plaintiff is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a) (a party may move for partial summary judgment as to a claim, defense, or part of a claim or defense); Fed. R. Civ. P. 56(b) ("a party may file a motion for summary judgment *at any time* until 30 days after the close of all discovery," "[u]nless a different time is set by local rule or the court orders otherwise." (emphasis added)). The Advisory Committee Notes to Rule 56 acknowledge that a motion for summary judgment may be filed "at the commencement of an action." *See* Fed. R. Civ. P. 56 advisory committee notes to the 2010 amendment. As the only issue is whether the Administrator missed a statutorily mandated deadline, discovery is unnecessary for this Court to grant summary judgment on the issue of liability and enter a declaratory judgment.

genuinely be in dispute – when the Administrator can provide relief redressing his violations of the law. As grounds for this Motion, Guardians states as follows:

INTRODUCTION

Guardians' suit is a straightforward "citizen suit" alleging that EPA has failed to comply with its mandatory statutory deadline for formally determining whether the Denver Metro-North Front Range Area in Colorado complied with the 2008 National Ambient Air Quality Standards for ozone ("2008 Ozone Standard") by the applicable attainment deadline. Pursuant to the Clean Air Act, the Administrator was required to make this determination by January 20, 2019, six months after the Denver Metro-North Front Range Area's July 20, 2018 attainment deadline. 42 U.S.C.A. § 7511(b)(2)(A) (requiring Administrator's attainment determination "[w]ithin 6 months following the applicable attainment date"); Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas for the 2008 Ozone National Ambient Air Quality Standards ("Reclassification Determination"), 81 Fed. Reg. 26,697, 26698 (May 4, 2016) ("The reclassified areas [including the Denver Metro-North Front Range Area] must attain the standard as expeditiously as practicable, but in any event no later than July 20, 2018.") As EPA admitted in its Answer, the agency has yet to do so. Answer ¶ 40, Dkt. 5 (May 28, 2019). Because EPA missed the statutory deadline for making the requisite determination, it has violated a mandatory, non-discretionary duty under the Clean Air Act.

Deadline suits such as this one are Congress' chosen remedy to force EPA to behave in a more timely fashion. It is for this reason that Congress provided the federal courts with jurisdiction to hear suits "against [EPA] where there is alleged a failure of [EPA] to perform any

act or duty … which is *not discretionary* with [EPA]." 42 U.S.C § 7604(a)(2) (emphasis added).

Although this case concerns a missed deadline, this Court should not lose sight of the importance of the underlying decision that EPA must make. Through this action, Guardians seeks to compel EPA to make a determination whether the Denver Metro-North Front Range attained compliance with the 2008 Ozone Standard by the July 20, 2018 attainment deadline. EPA was required to make this determination within six months of the attainment deadline, or by January 20, 2019.

Ground-level ozone, the primary component of smog, is a pollutant harmful to human health. Created when volatile organic compounds ("VOCs") and nitrogen oxides ("NOx"), emitted from tailpipes, smokestacks, and oil and gas production, react with sunlight, ozone poses numerous adverse health and environmental impacts. Public health impacts from ozone exposure range from respiratory irritation and impairment of breathing to hospitalization and an increased risk of premature death. Ground-level ozone further harms growing plants, causes defoliation of trees and crops, and can impair the healthy functioning of entire ecosystems. Complaint for Declaratory and Injunctive Relief ("Complaint") ¶ 2, Dkt. 1 (Mar. 26, 2019); Answer ¶ 2 (admitting that ozone is "a pollutant that is harmful to human health" and the environment).

Given continuing high levels of ozone pollution in the region, if the Administrator finalized his determination that the area failed to attain compliance with the 2008 Ozone Standard, this determination would trigger additional pollution abatement requirements for the area. Specifically, the State of Colorado would need to adopt more stringent clean air safeguards to reduce ozone pollution, submit a plan to clean up the region's unhealthy air, and set a new deadline for the area to finally come into attainment with the 2008 Ozone Standard. The

Administrator's unlawful delay is forcing the Denver Metro-North Front Range Area – including Guardians' staff and members – to endure greater air pollution and public health risks than permitted by the Clean Air Act.

Guardians has brought this Clean Air Act citizen suit to compel EPA to start the clock for air quality improvements in the Denver Metro-North Front Range of Colorado. Guardians asks the Court to grant Plaintiff's Motion for Partial Summary Judgment on the issue of liability and to enter a declaratory judgment that the Administrator has violated and continues to violate the Clean Air Act by failing to make the required attainment determination. Although factual disputes may arise as to the timing of relief,[2] there can be no material factual disputes as to the Administrator's liability for violating a mandatory statutory deadline. Partial summary judgment as to liability is appropriate.

LEGAL BACKGROUND: THE CLEAN AIR ACT

Congress enacted the Clean Air Act to "speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again." H.R. Rep. No. 91-1146, at 1 (1970), reprinted in 1970 U.S.C.C.A.N. 5356, 5356. The Clean Air Act was intended "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C.A. § 7401(b).

Consistent with these goals, the Act requires EPA to set National Ambient Air Quality Standards for certain pollutants, including ozone, "the attainment and maintenance of which . . .

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[2] If the Administrator objects to an expeditious date certain for providing relief due to alleged conflicting priorities or shortage of resources, a factual dispute that warrants discovery may arise; however, discovery is unnecessary for this Court to enter a declaratory judgment on the issue of Defendant's liability.

are requisite to protect the public health" with "an adequate margin of safety," 42 U.S.C.A. §§ 7409(a)-(b), and to designate areas with air pollution levels that exceed the national standards as "nonattainment" areas, 42 U.S.C.A. § 7407(d)(1).

Section 109(d)(1) of the Clean Air Act requires the Administrator to complete a "thorough review" of air quality criteria and the National Ambient Air Quality Standards every five years, and to "make such revisions in such criteria and standards and promulgate such new standards as may be appropriate" under the Act. 42 U.S.C.A. § 7409(d).

After EPA establishes or revises a National Ambient Air Quality Standard, the Clean Air Act "requires EPA and States to begin taking steps to ensure that the new or revised standards are met." National Ambient Air Quality Standards for Ozone ("2008 Ozone Standard"), 73 Fed. Reg. 16,436, 16,503 (Mar. 27, 2008). "The first step is to identify areas of the country that do not attain the new or revised standards, or that contribute to violations of the new or revised standards," and to designate such areas as in a state of "nonattainment." *Id.* The Administrator classifies ozone nonattainment areas as Marginal, Moderate, Serious, Severe, or Extreme, based on the level of ozone pollution monitored in the area. 42 U.S.C.A. § 7511.

States in which ozone nonattainment areas are located are required to adopt State Implementation Plans to reduce ozone pollution to below the applicable National Ambient Air Quality Standards, in this case the 2008 Ozone Standard. *Id.* § 7511a. State and local air quality management agencies develop these plans and submit them to EPA for approval. To receive EPA approval, State Implementation Plans must identify the specific emissions control requirements the state will rely on to attain and/or maintain compliance with the applicable National Ambient Air Quality Standards. *Id.* §§ 7502, 7511a.

Baseline federal regulatory requirements for State Implementation Plans vary depending on the nonattainment area's classification level, mandating that areas experiencing more severe ozone pollution make greater efforts to improve air quality. For example, plans for all ozone nonattainment areas must require any increase in VOC emissions (an ozone precursor) to be "offset" by reductions in VOC emissions, but the offset ratio (emissions reductions to increases) ratchets up for more serious nonattainment classifications. *Id.* § 7511a. For Marginal Areas, the offset ratio is 1.1, which increases to 1.15 for Moderate nonattainment areas, up to 1.2 to 1 for Serious Areas, up to 1.3 to 1 for Severe Areas, and finally up to 1.5 to 1 for Extreme Areas. *Id.*

In Serious Areas, the level of VOC emissions at which a source is treated as a "major source" also drops from 100 to 50 tons per year. *Compare* 40 C.F.R. § 70.2 (generally defining "major source") *with* 42 U.S.C.A. § 7511a(c) (defining "major source" for Serious Areas). Thus, unlike in Marginal and Moderate Areas, existing sources in Serious Areas with the potential to emit between 50 and 100 tons of VOCs per year must apply for a Title V operating permit as a major source, 40 C.F.R. § 70.3(a)(1), and new or modified major sources with potential emissions between 50 and 100 tons per year also face stringent preconstruction New Source Review permitting requirements. 42 U.S.C.A. § 7502(c)(5).

State implementation plans for ozone nonattainment areas are generally due within 3 years of EPA's nonattainment designation. 42 U.S.C.A. § 7502(b).

EPA promulgated the 2008 Ozone Standard on March 27, 2008, setting a limit on ozone concentrations in the air of no more than 0.075 ppm on an eight-hour basis. 2008 Ozone Standard, 73 Fed. Reg. at 16,483. A violation occurs at a monitoring site when the three-year average of the annual fourth highest eight-hour ozone concentration exceeds 0.075 ppm, or 75

ppb. 40 C.F.R. § 50.15(b). The 2008 Ozone Standard provided a higher level of air quality protection than the [superseded] 1997 Ozone Standard, based on EPA's determination of public health requirements.[3]

Congress set forth a precise schedule for implementation of the Clean Air Act and mandatory remedies for delays to ensure that public health would be protected. By statute, Congress established specific deadlines for designated nonattainment areas to attain compliance with applicable ozone standards. 42 U.S.C.A. § 7511(a)(1). Initial nonattainment areas were given between three years (for Marginal Areas) up to twenty years (for Severe Areas) to meet ozone standards. *Id.* When new nonattainment areas are designated, they are given similar time periods for attaining compliance, running from the date of the nonattainment designation. *Id.* § 7511 (b)(1).

After the Administrator's initial 2012 designation of nonattainment areas for the 2008 Ozone Standard, Marginal Areas were given three years to sufficiently improve air quality to meet the new ozone limits. For these Marginal Areas, the attainment deadline was set for July 20, 2015. *Id.* §§ 7511(a)(1) (setting three year period for attainment after designation of Marginal Area nonattainment), (b)(1) (applying compliance timeline from § 7511(a)(1) to later-designated nonattainment areas based on date of nonattainment classification); Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards ("Air Quality Designations"), 77 Fed. Reg. 30,088, 30,110 n. 1 (May 21, 2012) (noting nonattainment designation date of July 20,

[3] Note that although EPA finalized a new, even stricter ozone NAAQS in 2015, limiting concentrations to no more than 0.070 ppm over an eight-hour period, *see* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015), EPA has retained the 2008 Ozone Standards in addition to the new 2015 standard. Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications and State Implementation Plan Requirements, 83 Fed. Reg. 62,998, 63,000 (Dec. 6, 2018).

2012); Reclassification Determination, 81 Fed. Reg. at 26,699 (noting areas, including the Denver Metro-North Front Range Area, which "failed to attain the [2008 Ozone Standard] by the applicable attainment date of July 20, 2015").

Moderate Areas were given six years to comply with the 2008 Ozone Standard, and the attainment deadline for such areas was set for July 20, 2018. *Id.* Within six months after the July 20, 2018 attainment deadline, or by January 20, 2019, the Administrator was then required to determine whether Moderate Areas attained compliance with the 2008 Ozone Standard. 42 U.S.C.A. § 7511(b)(2)(A).

The Clean Air Act requires that where an ozone nonattainment area fails to attain compliance with ozone standards by the applicable attainment date, the nonattainment area shall be "reclassified" to a higher, more stringent nonattainment classification. 42 U.S.C.A. § 7511(b)(2)(A). As the D.C. Circuit has explained, "[i]f the EPA finds a nonattainment area has not met its attainment deadline, the EPA must reclassify, or 'bump up', the area." *Sierra Club v. Johnson*, 374 F. Supp. 2d 30, 31 (D.D.C. 2005). Once bumped up, a nonattainment area is generally treated as if it had been initially classified at the higher level, and it must meet deadlines applicable to this new classification. 42 U.S.C.A. § 7511(b)(1).

If EPA fails to comply with a nondiscretionary duty, including performing its duty to make a timely determination whether a nonattainment area has attained compliance with an applicable NAAQS by the attainment deadline, the Clean Air Act allows any person to bring suit to compel EPA to perform its duty. *See id.* § 7604(a)(2).

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Denver Metro-North Front Range nonattainment area includes the entirety of the counties of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson, and portions of the counties of Larimer and Weld. *See* 40 C.F.R. § 81.306.

2. In May 2012, the Administrator officially designated the Denver Metro-North Front Range Area of Colorado as in marginal nonattainment with the 2008 Ozone Standard, effective July 20, 2012. Air Quality Designations, 77 Fed. Reg. at 30,088 & 30,110 n.1.

3. After this nonattainment designation, Colorado was required to adopt and implement air quality regulations to bring the Denver Metro-North Front Range Area into attainment with the 2008 Ozone Standard by July 20, 2015. 42 U.S.C.A. § 7511(a)(1) (establishing 3-year period for marginal areas to come into attainment); Air Quality Designations, 77 Fed. Reg. 30,088, 30,110 n. 1 (noting the nonattainment designation date of July 20, 2012); Reclassification Determination, 81 Fed. Reg. at 26,699 & tbl. 3 (determining that 11 areas, including the Denver Metro-North Front Range Area "failed to attain the [2008 Ozone Standard] by the applicable attainment date of July 20, 2015").

4. The State of Colorado, however, failed to take sufficient action between 2012 and 2015 to improve air quality as needed to protect public health and welfare in the Denver Metro-North Front Range area, and air quality in the Denver Metro-North Front Range Area failed to meet the 2008 Ozone Standard by the July 20, 2015 attainment deadline. Reclassification Determination, 81 Fed. Reg. at 26,699 & tbl. 3.

5. Because of this continued nonattainment, the Administrator was legally required to reclassify the region and "bump up" its nonattainment status from Marginal to Moderate,

which then-Administrator McCarthy did by rule on May 4, 2016, effective June 3, 2016. *See id.* at 26,699.

6. After the 2016 Moderate nonattainment designation, the State of Colorado was then required to bring the Denver Metro-North Front Range Area into compliance with the 2008 Ozone Standard within six years after the effective date of EPA's initial designation of nonattainment, or by July 20, 2018. *See* 42 U.S.C.A. § 7511(a)(1) (setting 6-year period for attainment in Moderate nonattainment areas); Reclassification Determination, 81 Fed. Reg. at 26698 (stating "[t]he reclassified areas must attain the standard as expeditiously as practicable, but in any event no later than July 20, 2018.").

7. Within six months after the July 20, 2018 attainment deadline, or by January 20, 2019, the Administrator was then required to determine whether the area attained the NAAQS. 42 U.S.C.A. § 7511(b)(2)(A).

8. As of the date of this motion, the Administrator has yet to make such a determination. Answer ¶ 40; Declaration of Jeremy Nichols ("Nichols Decl.") ¶ 15 (Exhibit A).

9. In 2018, EPA proposed to grant the State of Colorado a one-year extension to demonstrate attainment. *See* Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas Classified as Moderate for the 2008 Ozone National Ambient Air Quality Standards ("Extension Proposal"), 83 Fed. Reg. 56,781, 56,786 (Nov. 14, 2018).

10. EPA has not finalized this rule to extend the attainment date for the Denver Metro-North Front Range Area. Answer ¶ 33 (admitting identical allegations in Guardians' complaint, Complaint ¶ 33 (Mar. 26, 2019)); Nichols Decl. ¶ 16 (Exhibit A); U.S. Envtl. Prot.

Agency, 8-Hour Ozone (2008) Attainment Date Extensions, https://www3.epa.gov/airquality/greenbook/hfr2rpt1.html (last accessed June 20, 2019).

11. On March 26, 2019, the State of Colorado formally withdrew its request for an extension of its ozone attainment deadline. *See* Letter from Gov. Jared Polis, State of Colorado, to Doug Benevento, Regional Administrator, USEPA Region VIII (Mar. 26, 2019) (attached as Exhibit B). As Governor Polis articulated, "given the vital importance of coming into compliance with the [2008 Ozone Standard] to protect the health of our communities, we believe that the interests of our citizens are best served by moving aggressively forward and without delay in our efforts to reduce ground level ozone concentrations in the Denver Metro/North Front Range nonattainment area." *Id.*

12. Thus, by January 20, 2019, the Administrator was required to make a formal determination as to whether the Denver Metro-North Front Range Area attained compliance with the 2008 Ozone Standard by the July 20, 2018 attainment date. Reclassification Determination, 81 Fed. Reg. at 26,698; 42 U.S.C.A. § 7511(b)(2)(A).

13. The Administrator failed to do so by the January 20, 2019, deadline, and has not done so since. *See* Answer ¶ 10 (admitting that "the Administrator has not yet made a determination regarding the attainment of the 2008 Ozone NAAQS for the Denver Area").

STANDARD OF REVIEW

A court shall render summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir.

1998). The relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986). Summary judgment is not treated as "a disfavored procedural shortcut," but as "an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corporation v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

This is a motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(a) (Motion for Summary Judgment or Partial Summary Judgment), which allows a party to move for summary judgment, "not only as to an entire case but also as to a claim, defense, or part of a claim or defense." *See* Fed. R. Civ. P. 56 Advisory Committee Notes to the 2010 amendments. Fed. R. Civ. P. 56(b) also provides that a party may "file a motion for summary judgment *at any time* until 30 days after the close of all discovery," "[u]nless a different time is set by local rule or the court orders otherwise." (emphasis added). The Advisory Committee Notes to Rule 56 acknowledge that a motion for summary judgment may be filed "at the commencement of an action." *Id.*

Summary judgment as to liability is appropriate, as there can be no genuine disputes as to any material fact regarding the Administrator's liability and Guardians is entitled to judgment as a matter of law. The issue presented herein is whether the Administrator missed a statutorily mandated deadline under the Clean Air Act to make an ozone attainment determination for the Denver Metro-North Front Range Area. The Administrator has admitted that he "has not yet made a determination regarding the attainment of the 2008 Ozone NAAQS for the Denver Area," Answer ¶ 10, so the only issue before the court is the legal question of whether the

Administrator was required to make such an attainment determination by January 20, 2019. This legal question is easily resolved, as EPA itself has publicly acknowledged the January 20, 2019 attainment determination deadline. Extension Proposal, 83 Fed. Reg. at 56,785 (acknowledging that the Clean Air Act, 42 U.S.C.A. § 7511(b)(2)(B) "requires the EPA to publish the determination of failure to attain and accompanying reclassification in the Federal Register no later than 6 months after the attainment date, which in the case of the Moderate nonattainment areas considered in this proposal [including the Denver Metro-North Front Range Area] would be no later than January 20, 2019"). Therefore, discovery is unnecessary. If factual disputes arise as to when the Administrator can provide relief for these violations of the law, the parties may conduct discovery on that issue before briefing the issue of relief to this Court.

In reviewing this failure by EPA, this Court is governed by the standard of review in the Administrative Procedure Act ("APA"), which controls in the absence of an internal standard of review in the Clean Air Act. *See Arizona Pub. Serv. Co. v. United States EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 324 (2d Cir. 2003). Under the APA, the reviewing court is directed to "compel agency action unlawfully withheld or unreasonably delayed . . . ." 5 U.S.C.A. § 706(1).

ARGUMENT

I. Guardians Has Standing to Advance Its Claim

Because Guardians bears the burden of proving its standing as part of its affirmative case, it briefly sets forth the necessary facts and argument here to establish standing. Guardians has standing to bring this suit on behalf of its members because: (1) its members have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3)

neither the claim asserted, nor the relief sought requires Guardians' members to participate directly in this lawsuit. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

Guardians' members have standing to sue in their own right. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), the Supreme Court held the "irreducible constitutional minimum" for Article III standing requires a party to show that it has suffered an injury in fact, that there exists a causal connection between that injury and the conduct complained of, and that a favorable decision on the merits will likely redress the injury. Here, Guardians' members have suffered an injury. *See* Nichols Decl. ¶ 6-11, 18-20. (Exhibit A). Guardians members live, work, and recreate in the Denver Metro-North Front Range Area. *Id.* § 2, 4, 6, 8. Members' health and well-being are negatively impacted by harmful ozone pollution, and their quality of life and enjoyment of outdoor recreational activities is further impaired by ozone pollution, causing members to avoid or limit outdoor activities on high ozone days. *Id.* ¶ 8–11. These injuries are caused by the Administrator's conduct and would be redressed by a favorable decision. *See* id. ¶¶ 12–22.

Because Guardians' members have standing to sue in their own right, the Organization satisfies the first element of the Supreme Court's *Hunt* test. Guardians also easily satisfies the second and third *Hunt* requirements, because the interests of Guardians' members at stake are germane to the Organization's purpose, *see* Nichols Decl. ¶¶ 2-3, and none of the claims Guardians asserts requires its members to participate as individuals in this litigation. Further, Guardians seeks only declaratory and injunctive relief, not monetary damages based on injury to

its individual members, so individual participation is unnecessary beyond the standing inquiry. Accordingly, Guardians has standing to bring this action. *Hunt*, 432 U.S. at 343.

II. Guardians Is Entitled to Summary Judgment

There are no genuine disputes as to any material facts. Following EPA's promulgation of the 2008 Ozone Standard, EPA initially designated the Denver Metro-North Front Range area as in a state of marginal nonattainment with the 2008 Ozone Standard effective July 20, 2012. EPA, Air Quality Designations, 77 Fed. Reg. 30,088, 30,110 (May 21, 2012).

After this initial nonattainment designation, the Denver Metro-North Front Range Area again failed to attain compliance with the 2008 Ozone Standard by its new July 20, 2015 deadline. Answer ¶ 36. Accordingly, as required by the Clean Air Act, EPA "bumped up" the classification of the Denver Metro-North Front Range area's nonattainment with the 2008 Ozone Standard from Marginal to Moderate, effective June 3, 2016. *See* Reclassification Determination, 81 Fed. Reg. at 26,699 tbl. 3 (listing Denver Metro-North Front Range Area among "Marginal NonAttainment Areas to Be Reclassified as Moderate Because They Did Not Attain the [2008 Ozone Standard] by the July 20, 2015 Attainment Date").

After being 'bumped up' to a Moderate Area, the Denver Metro-North Front Range Area was legally required to attain compliance with the 2008 Ozone Standard by the attainment deadline of July 20, 2018. 42 U.S.C.A. § 7511(a)(1), (b)(1); Reclassification Determination, 81 Fed. Reg. at 26,698. As EPA articulated, "The reclassified areas must attain the standard as expeditiously as practicable, but in any event no later than July 20, 2018." Reclassification Determination, 81 Fed. Reg. at 26,698.

EPA has not extended Denver's attainment date beyond July 20, 2018. Answer ¶ 38; Nichols Decl. ¶ 16.

Within six months of the July 20, 2018 attainment deadline, or by January 20, 2019, the Administrator was required by the Clean Air Act to make a formal determination as to whether the Denver Metro-North Front Range Area attained compliance with the 2008 Ozone Standard by the attainment date. 42 U.S.C.A. § 7511(b)(2)(A). In proposing a one-year extension of the attainment deadline for the Denver Metro-North Front Range Area, EPA admitted its "statutory obligation to determine whether ozone nonattainment areas attained the NAAQS by the attainment date, and, within 6 months of the attainment date, publish a notice in the Federal Register identifying each area that is determined as having failed to attain and identifying the reclassification." Extension Proposal, 83 Fed. Reg. at 56,782. *See also id.* at 56,783 ("The EPA Administrator is required to determine whether areas designated nonattainment for an ozone NAAQS attained the standard by the applicable attainment date, and to take certain steps for areas that failed to attain." (citing 42 U.S.C.A. § 7511(b)(2)).

Hence, in the absence of an approved extension of the July 20, 2018 attainment date, EPA was legally obligated to make an attainment determination within six months of that date, or by January 20, 2019. *See* 42 U.S.C.A. § 7511(b)(2)(A) ("Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date.").

The Administrator's failure to make this legally-required determination is delaying clean air for the Denver Metro-North Front Range Area. Existing publicly-available EPA data

indicates that the Denver Metro-North Front Range Area likely failed to meet the 2008 Ozone Standard by the attainment date. If the Administrator finalized his determination that the area failed to attain compliance with the 2008 Ozone Standard, EPA would be required as a matter of law to "bump up" the classification of the area from Moderate to Serious. *See* 42 U.S.C.A. § 7511(b)(2)(A)(i). This change in classification would require the State of Colorado to adopt more stringent clean air safeguards to reduce ozone pollution and to submit a revised State Implementation Plan to clean up the region's unhealthy air, and would set a new deadline for the area to finally come into attainment with the 2008 Ozone Standard. In essence, the Administrator's delay is forcing the residents of and visitors to the Denver Metro-North Front Range Area to endure greater air pollution and public health risks than the law allows.

Where, as here, Congress has "directly spoken" to the issues at hand, the court must give effect to that plain intent without affording any deference to a contrary agency interpretation.[4] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). *See also Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) ("If the statute is clear and unambiguous, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Section 181 of the Clean Air Act states, in material part:

> *Within 6 months* following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator *shall* determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date.

42 U.S.C.A. § 7511(b)(2) (emphasis added). Congress's use of the word "shall" in Section 181 of the Act establishes that EPA had a mandatory duty to determine whether the Denver Metro-

[4] However, there is no contrary agency interpretation at issue here, as EPA has acknowledged that this statute requires EPA to make an attainment determination within six months of an applicable attainment deadline. Extension Proposal, 83 Fed. Reg. at 56,785.

North Front Range Area attained the 2008 Ozone Standard by the July 20, 2018 attainment deadline, such determination to be made within six months of that attainment deadline, or by January 20, 2019.

The use of the word "shall" in the above-cited passage imposes a non-discretionary duty on the Administrator. The Supreme Court has stated, with regard to the use of the word "shall" in establishing deadlines in an environmental statute, that uses of this term "are plainly those of obligation rather than discretion ..." *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (finding establishment of mandatory deadlines in Endangered Species Act). The Tenth Circuit has explicitly held that in statutory text "'shall' means shall," imposing a mandatory duty with respect to statutorily imposed deadlines. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) ("[W]hen an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act.").

Thus, Congress' express use of the word "shall" in Section 181 of the Clean Air Act imposes a non-discretionary duty on the Administrator. *See, e.g., Sierra Club v. Johnson*, 541 F.3d 1257, 1265 (11th Cir. 2008). The plain language of the Clean Air Act leaves no doubt that the Administrator violated, and is continuing to violate, the Act by failing to make the required attainment determination.

EPA's duty and liability in this case cannot be reasonably disputed. The Administrator failed to make the required attainment determination for the Denver Metro-North Front Range Area by the mandatory deadline of January 20, 2019, and the Administrator admits that he has not yet made the required attainment determination. Answer ¶ 40 (admitting that "the

Administrator did not make an attainment determination for the Denver Area by January 20, 2019, and has not made an attainment determination since that date").

EPA has not met the statutory deadline for making the required finding whether the Denver Metro-North Front Range Area attained compliance with the 2008 Ozone Standard by the applicable attainment deadline, as required by the clear, unambiguous will of Congress expressed in the plain language of the Clean Air Act. In the face of past agency attempts to assert their discretion to extend deadlines clearly mandated by the unambiguous will of Congress, the Tenth Circuit has repeatedly held that such discretion does not exist. *See, e.g., Forest Guardians v. Babbitt*, 174 F.3d at 1178, 1187-88 (discussing, in regard to a statutory deadline, numerous cases establishing that "administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform," quoting *Health Sys. Agency of Oklahoma v. Norman*, 589 F.2d 486, 492 (10th Cir. 1978)).

Although its deadline passed five months ago, EPA has not made the required findings regarding whether or not the Denver Metro-North Front Range Area attained compliance with the 2008 Ozone Standard by the applicable attainment deadline. Therefore, EPA has violated and continues to violate its mandatory, non-discretionary duty in 42 U.S.C.A. § 7511(b)(2) by failing to make the attainment determination.

This violation constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of the Clean Air Act's citizen suit provision. 42 U.S.C.A. § 7604(a)(2). The Administrator's violation is ongoing and will continue unless this Court grants the requested relief. There is no reason for this Court to tolerate further unlawful delay.

CONCLUSION

For the reasons set forth above, Guardians respectfully requests that this Court grant its motion for partial summary judgment on liability and enter a declaratory judgment that the Administrator has violated and continues to violate the Clean Air Act by failing to make the requisite attainment determination for the Denver Metro-North Front Range Area with respect to the 2008 Ozone Standard. Resolving the issue of EPA's liability now, with subsequent briefing on the issue of timing of relief, will provide the most expeditious resolution to this case, which has been delayed long enough by the EPA's refusal to make the requisite findings.

Respectfully Submitted on this 20th day of June, 2019.

/s/ Daniel L. Timmons
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Attorneys for Plaintiff WildEarth Guardians

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record in this case.

/s/ Daniel L. Timmons
Daniel L. Timmons

Attorney for Plaintiff WildEarth Guardians

CERTIFICATE OF COMPLAINCE WITH LOCAL RULE 7.1

In accordance with D.C.COLO.LCivR 7.1, I hereby certify that I conferred with opposing counsel regarding this motion. Specifically, I spoke with opposing counsel by telephone and conferred regarding this motion on June 11, 2019. On June 18, 2018, I attempted to again confer by telephone. When I was unable to reach opposing counsel, I left a voicemail and sent a follow-up electronic message regarding this motion and possible settlement. To date, I have received no response from opposing counsel regarding these communications.

/s/ Daniel L. Timmons
Daniel L. Timmons

Attorney for Plaintiff WildEarth Guardians

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-00897-JLK

WILDEARTH GUARDIANS,

Plaintiff,

v.

ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency

Defendant.

DECLARATION OF JEREMY NICHOLS

I, Jeremy Nichols, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge. If called as a witness in these proceedings, I could and would testify competently to these facts.

2. I am an employee and dues-paying member of WildEarth Guardians and have been since July 2008. WildEarth Guardians is a non-profit environmental organization dedicated to protecting and restoring the wildlife, wild places, wild rivers and health of the American West. WildEarth Guardians is headquartered in Santa Fe, New Mexico, but maintains offices in Denver, Colorado, Tucson, Arizona, and Missoula, Montana. I support the mission of the organization personally and professionally.

3. I am the Director of WildEarth Guardians' Climate and Energy Program. WildEarth Guardians' Climate and Energy Program aims to protect the wildlife, wild places, and wild rivers of the American West from the impacts of fossil fuel development and consumption with an aim

to curtail greenhouse gas emissions and safeguard the climate. As Director of the Climate and Energy Program, I advocate for the development and promotion of cleaner energy solutions that can help our society shift away from the use of fossil fuels in order to safeguard our climate, our clean air, and our communities. As part of my work as Climate and Energy Program Director, I focus extensively on combating air pollution in the American West.

4. I reside in Golden, Colorado, which is a part of the Denver Metro area. I've lived in Golden for 10 years. Previous to that, I lived in Denver for nearly five years. I live here with my wife and two teenage boys. We plan to live here for the foreseeable future.

5. In my years of living in the Denver Metro area, I've become very familiar with the region's air quality problems, mainly its ground-level ozone problem. Ground-level ozone is the key ingredient of smog and a poisonous gas.

6. Ever since I moved to the area in early 2005, I've noticed the summertime air quality often diminishes. I notice this because I frequently recreate outdoors. I ride my bike, hike, and am generally outdoors virtually every day in the summertime. Ever since moving to the Denver Metro area, I've noticed that during the summer, the air often becomes smoggy and unpleasant to breathe. I am aware that much of this deteriorated air quality ties back to ground-level ozone pollution, which is formed when air pollutants from smokestacks, tailpipes, and oil and gas facilities react with sunlight. The key ozone forming pollutants are volatile organic compounds and nitrogen oxides. The region's ozone problem is widely known and widely documented. Much of the problem is attributed to oil and gas development in the region, which is the largest source of volatile organic compound emissions.

7. I am aware that for years, the Denver Metro area, including the North Front Range region, including large portions of Larimer and Weld Counties, has been designated a

"nonattainment" area due to violations of federal limits on ground-level ozone. I am aware that every summer, the region where I live, work, and recreate continues to experience elevated ozone levels and that exceedances of federal health limits are a regular occurrence in the Denver Metro area.

8. The region's ozone pollution interferes with my recreational enjoyment of the outdoors, my quality of life, and my feeling of being safe and healthy where I live. Every summer in the Denver Metro area, I avoid going outdoors on high ozone days. Often times when ozone levels get severely elevated, my family and I will leave town to recreate somewhere else in Colorado. Although we appreciate the opportunity to leave town, it not pleasant to do so under threat of air pollution.

9. I receive e-mail alerts from the Colorado Department of Public Health and Environment whenever ozone levels are likely to be high, so I know when to avoid or limit going outdoors. My recreational enjoyment of hiking and biking is diminished when I have to observe visibly polluted air or breathe that air. I am concerned for my health and the health of my family when ozone levels are elevated. Because of this concern, I get frustrated and anxious about being outdoors and letting my family go outdoors.

10. I live in Golden because of its proximity to nature and its small-town feel. Ozone pollution in the Denver Metro area diminishes my enjoyment of Golden's quality of life. Its small-town feel is severely impacted when smog levels are high.

11. Living in Golden, we are especially impacted by ground-level ozone in the Denver Metro area. There is an ozone monitor in Golden located near the National Renewable Energy Laboratory on South Table Mountain. This monitor frequently records some of the highest summertime ozone concentrations in the Denver Metro area. I live on the flanks of North Table

Mountain in North Golden. My house is at virtually the same elevation as that monitoring site, meaning the ozone concentrations recorded at that monitor are very likely the same concentrations I am breathing and experiencing at my house. It troubles me that during the summer my home is often smothered in smog.

12. I am aware that the State of Colorado was required to reduce ground-level ozone concentrations in the Denver Metro area in order to comply with federal health standards that were adopted by the U.S. Environmental Protection Agency in 2008. I am aware that the State was required to meet a clean up deadline of July 20, 2018. I know firsthand that the State did not meet this deadline. The summer of 2018 was a particularly smoggy summer with numerous exceedances of ozone health standards reported that year. Even State regulators had to acknowledge that the Denver Metro area failed to attain legally required health limits.

13. Because of Colorado's failure to attain the 2008 ozone standards by July 20, 2018, the Administrator of the U.S. Environmental Protection Agency ("EPA Administrator") was legally obligated to make a "finding" that the State failed to attain, which would trigger a "bump up" in the classification of the Denver Metro nonattainment area. Currently, the region is classified as a "moderate" nonattainment area. After the "bump up," the region would be classified as a "serious" nonattainment area.

14. From a clean air standpoint, the consequences of a "bump up" are tremendous. According to the federal Clean Air Act, once a region is classified as a "serious" ozone nonattainment area, it becomes subject to much more stringent air quality regulation. Air pollution reduction requirements become more rigorous and intense, new sources of air pollution become subject to much greater scrutiny, and states face more significant consequences for failing to maintain progress in cleaning up the air.

15. One big change that happens when a region is classified as a "serious" nonattainment area is that the threshold for major stationary source permitting becomes more stringent. Currently in the Denver Metro area, any major stationary source of air pollution that has the potential to emit more than 100 tons per year of ozone forming air pollution must obtain a major source permit prior to beginning construction. A major source permit is a very stringent permit requiring, among other things, that sources to meet lowest achievable emission rates, offset total emissions, and protect visibility in National Parks and Wilderness Areas. In a "serious" ozone nonattainment area, the major source threshold is dropped from 100 tons per year to 50 tons per year of ozone forming air pollution.

16. As of the date of this declaration, the EPA Administrator has yet to make a finding that Colorado failed to attain the 2008 ozone standards in the Denver Metro area. The EPA Administrator's delay has had the effect of forestalling the "bump up" of the region's nonattainment classification from moderate to serious. This means the region is being denied the opportunity to enjoy the more rigorous clean air benefits that flow from being classified as a serious nonattainment area.

17. I am aware that EPA proposed a one year extension of the attainment deadline for the Denver Metro Area, but as of the date of this declaration, EPA has not finalized an extension of the attainment deadline.

18. The EPA Administrator's delay is harming me and in turn WildEarth Guardians because it is denying the Denver Metro area the clean air safeguards that would otherwise be in place if the region was bumped up to a serious nonattainment area. One concrete example of this is in regards to permitting of new stationary sources of air pollution. Currently, the State of Colorado is currently weighing the approval of numerous permits for new oil and gas facilities within the

nonattainment area. Many of these permits would authorize sources to release more than 50 but less than 100 tons per year of volatile organic compounds. If the region was classified as a serious nonattainment area, these sources would be subject to major sources permits. Unfortunately, these sources are not required to obtain major source permits right now given the EPA Administrator's delay.

19. An example of this is in regards to a Noble Energy oil and gas production facility located in Weld County within the ozone nonattainment area. The company is currently seeking a permit for its "Centennial State" production facility. The proposed permit is available online at https://drive.google.com/file/d/1pt-pkoMu6PwYGVDZ6-MWvbQ1QBliKjOx/view?usp=sharing. According to the proposed permit, the source would be allowed to release 78.4 tons of volatile organic compounds, which would trigger major source permitting thresholds for serious nonattainment areas. If this facility was subject to major source permitting, it would be subject to more stringent emission limits and most importantly, Noble Energy would be required to offset emissions. This means that if the facility was subject to major source permitting, there would be a net reduction in emissions. Unfortunately, without the "bump up," the permitting of this facility will lead to a net increase in ozone forming emissions.

20. The EPA Administrator's delay is denying the Denver Metro area the clean air tools needed to truly get handle on the region's ground-level ozone problem. In doing so, the Environmental Protection Agency is perpetuating the poor air quality that interferes with my enjoyment of outdoor recreation in the region and that undermines my quality of life in Golden. The EPA Administrator's delay harms me and will continue to harm me in the foreseeable future as I continue to live and recreate outdoors in the Denver Metro area.

21. If the EPA Administrator made his long-overdue finding, it would ensure the Denver Metro ozone nonattainment area is bumped up to a serious nonattainment area. This "bump up" will lead to more significant emission reductions and a higher likelihood that the region's smog pollution will be reduced to levels that comply with the 2008 ozone standards. This will ameliorate many of the harms I would otherwise experience as I live and recreate outdoors in the Denver Metro area. If ozone pollution is further limited, my enjoyment of outdoor recreation will not be as diminished, my qualify of life will be enhanced, and my concerns over my health and welfare will be eased.

22. If the EPA Administrator made his finding that the Denver Metro area failed to meet the 2008 ozone standards, it would remedy many of the harms I currently experience as a resident and outdoor recreationist in the Denver Metro ozone nonattainment area. It would also remedy the harms I would otherwise experience in the foreseeable future if ozone concentrations were not curtailed. A ruling in this case compelling the EPA Administrator to make its legally required finding as quickly as possible would redress the harms that I would otherwise experience.

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing is true and correct.

Executed this 20th day of June 2019 in Golden, Colorado

Jeremy Nichols

COLORADO
Governor Jared Polis

March 26, 2019

Doug Benevento
Regional Administrator
USEPA Region VIII
1595 Wynkoop Street
Denver, CO 80202-1129

Re: Withdrawal of Colorado's Request to Extend the 2008 Ozone National Ambient Air Quality Standard Attainment Date for the Denver Metropolitan/North Front Range Nonattainment Area

Dear Mr. Benevento:

The purpose of this letter is to notify the United States Environmental Protection Agency (EPA) of Colorado's request to withdraw its June 4, 2018 request to extend the attainment date for the 2008 ozone National Ambient Air Quality Standard (2008 NAAQS). The request was properly and timely made pursuant to 42 U.S.C. §§ 7502(a)(2)(C) and 7511(a)(5). EPA proposed to approve the request in its proposed rule, *Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas Classified as Moderate for the 2008 Ozone National Ambient Air Quality Standards*, 83 Fed. Reg. 56,781 (Nov. 14, 2018).

We wish to express our appreciation to the EPA for the time and effort involved in processing Colorado's request, and for proposing to approve it. But given the vital importance of coming into compliance with the 2008 ozone NAAQS to protect the health of our communities, we believe that the interests of our citizens are best served by moving aggressively forward and without delay in our efforts to reduce ground level ozone concentrations in the Denver Metro/North Front Range non-attainment area. Colorado requests that the EPA continue to work closely with our air planning agencies to develop appropriate and achievable schedules and strategies for continuing progress towards attainment of the 2008 NAAQS. We appreciate all of EPA's assistance in this regard, and look forward to a continued, productive working relationship on this critically important issue.

If you have any questions, please contact Garry Kaufman, Director of the Air Pollution Control Division, Colorado Department of Public Health and Environment, at 303-692-3114.

Sincerely,

Jared Polis
Governor